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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ERMA MILLER,

Petitioner,

v,

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1) Whether an illegal disclosure of tax return information by a senior I.R.S. official, who is aware of and who understands the rules prohibiting the disclosure of tax return information, to a person the official knows is a newspaper reporter, and whom the official knows or should know might print the information in a newspaper of general circulation, is "willful" or grossly negligent under Internal Revenue Code § 7431(c)(1)(B), or whether "willfulness" instead requires proof of a subjective intent to cause harm.

2) Whether an illegal disclosure of tax return information by an I.R.S. official to a reporter who the official knows or should know might print the disclosure in a newspaper of general circulation, and which disclosure results in the publishing of the illegally disclosed information in *181,734* copies of the newspaper circulated to the general public, is one "disclosure" or *181,734* "disclosures," under Internal Revenue Code §§ 7431(c)(1)(A) and 6103(b)(8).

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Erma Miller respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is unofficially reported at 95-2 U.S.T.C. ¶ 50, 516. It is not officially reported at this time. (App., infra, at pp. 1 to 13.) The decision of the United States District Court for the Central District of California is not reported at this time. (App., infra, at pp. 14 to 20.)

JURISDICTION

The decision of the Court of Appeals was entered on September 18, 1995. No petition for rehearing and no request for extension of time to file a petition for writ of certiorari was filed. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This action involves 26 U.S.C. § 7431(a)(1) and (2), and 26 U.S.C. § 6103(b)(8), which provide, in pertinent part:

> § 7431. Civil Damages for Unauthorized Disclosure of Returns and Return Information
>
> (a) In General.
>
> (1) Disclosure by Employee of United States. If any officer or employee of the United States knowingly, or by reason of negligence,

discloses any return or return information with respect to a taxpayer in violation of any provision of Section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

* * *

(c) Damages. In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of --

(1) the greater of --

(A) $1,000.00 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of --

(i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus

(ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action.

§ 6103. Confidentiality and Disclosure of Returns and Return Information

* * *

(b) Definitions. -- For purposes of this section --

(8) Disclosure. -- The term "disclosure" means the making known to any person in any manner whatever a return or return information.

STATEMENT

1. The Jeopardy Assessments

The petitioner Erma Miller's former husband, Lynn Stites, was a prominent attorney. In 1989, Stites became the target of a fraud investigation conducted by the San Diego U.S. Attorney's Office. The U.S. Attorney's Office provided information to the I.R.S. in order to have a jeopardy assessment made against Stites. After receipt of this information, on November 15, 1989, the I.R.S. made a multi-million dollar jeopardy assessment against Stites and petitioner for unpaid income tax for 1987. See App., infra, at pp. 4, 5.

The jeopardy assessment was based upon the unsupported assumption that a third party had received several millions in unreported income that he paid to Stites. This assumption was contrary to information in the possession of the I.R.S. After petitioner filed an action challenging the jeopardy assessment, pursuant to 26 U.S.C. § 7429, the I.R.S. abated the assessment against both petitioner and Stites. In the subsequent Tax Court

proceeding, the IRS conceded that neither petitioner nor her former husband owed any additional taxes for 1987. App., infra, at pp. 4-5, 15.

2. The Illegal Disclosure

The investigation of Stites was highly publicized in the Los Angeles and San Diego areas.[1] Because of the publicity engendered by the case, Myron Levin, a Los Angeles Times staff reporter, began preparing a story about the jeopardy assessment and the government's concession. In gathering information for the story, Levin telephoned an I.R.S. official in Los Angeles, Richard Davega. App., infra, at pp. 5, 15, 16.

As Chief, Special Procedures Function, Davega was a senior-level managerial official in the Los Angeles District of the I.R.S. who had received training in the disclosure of return information. He knew that return information was not to be disclosed to a third party without written authorization from the taxpayer and that any inquiries from the media were to be referred to the I.R.S. public affairs office. Davega further knew that the amount collected from any given taxpayer constitutes "return information." App., infra, at pp. 11, 16, 18.

Levin identified himself to Davega as a Los Angeles Times reporter doing a story about the jeopardy assessments. Davega knew, or should have known, that any information he disclosed to Levin might be published in the Los Angeles Times. Nonetheless, Davega did not refer Levin to the I.R.S. public affairs office. Instead, in response to a question by Levin about the amount

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[1]Stites was also the subject of a *60 Minutes* episode and an article in the *American Bar Association Journal*.

collected from petitioner and Stites, Davega responded, "Let's just say it was insignificant." App., infra, at pp. 18, 19.

One or two days later, a story on the jeopardy assessment ran in the March 31, 1990, Valley edition of the Los Angeles Times. The Valley edition had a circulation of 181,734. The story, entitled "Fraud Inquiry Target Wins A Round in Court," included Davega's comment about the amount collected.

3. Proceedings Below

On March 27, 1992, petitioner filed her complaint with the United States District Court for the Central District of California. The complaint alleged one count of illegal collection activity, under Internal Revenue Code § 7433, based on the assertions that the jeopardy assessment had been done without any actual or legal foundation as part of the U.S. Attorney's efforts to freeze Stites' assets prior to his indictment, and one count of illegal disclosure of return information, under Internal Revenue Code § 7431. The court dismissed the § 7433 count for failure to state a claim for which relief could be granted, and the § 7431 count proceeded to trial. App., infra, at p. 6.

The government conceded that Davega's statement was a disclosure of return information. After trial, the District Court held that the disclosure was illegal, but that it was negligent and not willful or grossly negligent. Thus, the District Court thus concluded petitioner was not entitled to punitive damages under § 7431(c)(1)(B)(ii). It also held that Davega's statement to Levin and the resulting publication and distribution in 181,734 copies of the Los Angeles Times containing petitioner's tax return information constituted only one disclosure under §7431(c)(1)(A). It therefore awarded damages to plaintiff of only $1,000.00, plus

costs. The Ninth Circuit Court of Appeals affirmed. App., infra, at pp. 8, 11, 13.

The District Court had jurisdiction over the proceeding pursuant to 28 U.S.C. § 1340 and 26 U.S.C. § 7431, and the Ninth Circuit had jurisdiction over petitioner's appeal pursuant to 28 U.S.C. § 1291.

REASONS WHY THE WRIT SHOULD ISSUE

1. The Standard For Willfulness Under IRC § 7431.

The standard adopted by the Ninth Circuit in determining that Davega's illegal disclosure of return information to a person he knew was a reporter was not "willful" (or grossly negligent) under § 7431 conflicts with the standards enunciated by the Fourth Circuit Court of Appeals in Mallas v. United States, 95-1 USTC ¶ 50, 294 (May 15, 1995) and the Fifth Circuit Court of Appeals in Marre v. United States, 38 F.3d 823 (1994). This conflict among the Courts of Appeals is one that can and should be resolved by this Court. United States v. Williams, ____ U.S. ____ (1995); United States v. Gilmore, 372 U.S. 39 (1963).

The standard adopted by the Ninth Circuit was best expressed by its quote from the District Court's comments at trial: even though Davega consciously disclosed return information to a person he knew was a reporter, it was an "oops" -- Davega had no subjective intent to cause harm. App., infra, at p. 11.

The evidence at trial in the present case was uncontroverted. Davega testified that in 1990 he understood that it was a violation of the law to disclose return information to a third party unless specifically authorized by the Internal Revenue Code. He further testified that in 1990 he understood that the amount collected by IRS pursuant to a tax assessment constitutes return information. Davega also testified that in 1990 he understood that if an IRS employee received an inquiry from the media, such as a newspaper reporter, the procedure to be followed by the employee was to refer the inquiry directly to the IRS Public Affairs Office. App., infra, at p. 18; Appellant's Excerpts of Record[2] at pp. 16, 48, 49. Based on the trial testimony of Levin, the District Court found that Davega knew that he was speaking to a Los Angeles Times reporter, that Davega made the unauthorized disclosure of return information to the reporter, and that Davega knew, or should have known, that his statements to the reporter might be published in the Los Angeles Times. App., infra, at p. 19. These findings were not contested by the government in the appeal to the Ninth Circuit.

It was based on this record that the Ninth Circuit held that Davega's illegal disclosure was neither willful nor grossly negligent. Such a conclusion is directly in conflict with the standards of both the Fourth and Fifth Circuits.

The Fourth and Fifth Circuits both eschew any inquiry into the agent's subjective intent. The Marre court succinctly stated that disclosures are willful or grossly negligent if:

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[2]"Appellant's Excerpts of Record" (hereafter "AE") refers to the excerpts of record filed with the Court of Appeal.

> "made . . . without ground for believing that they were lawful or with a reckless disregard of . . . rights."

38 F.3d at 826. The Fourth Circuit, in Mallas, used the same test used by the Fifth Circuit in Marre. 95-1 U.S.T.C. at pp. 50, 195.

It is clear that Davega never claimed or believed that the disclosure to the reporter was proper. In fact, Davega testified that he had no recollection of any conversation with the reporter. AE at p. 50. Thus, in order for the Ninth Circuit to have concluded that the disclosure was neither willful nor grossly negligent, the Ninth Circuit had to have read into the statute a requirement that the term "willful" in section 7431 requires proof of a subjective intent to cause harm.

The Ninth Circuit's and the District Court's characterization of Davega's disclosure as a "momentary and insignificant oversight" does not change the fact that the disclosure was "willful" as a matter of law under the definition of "willful" used in the Fourth and Fifth Circuits in Mallas and Marre, respectively. The mere fact that an IRS employee who is knowledgeable of the disclosure laws has a "momentary" oversight of some sort does not negate "willfulness" as defined in Mallas and Marre. What negates "willfulness" is a belief that the disclosure was lawful. 38 F.3d at 826. Given the uncontroverted testimony of Davega regarding his awareness and understanding of the disclosure rules, and given the Ninth Circuit's awareness of this uncontroverted testimony in considering the appeal, the Ninth Circuit's holding can only be read in a manner that imposes a requirement of subjective intent to harm in the definition of "willfulness" under section 7431.

The fact that a "momentary oversight" of a person familiar with the relevant legal duties does not negate a determination of "willfulness" is further illustrated by reviewing the definition of "willful" under section 6672 of Title 26 of the United States Code. Section 6672 imposes personal liability upon any responsible person or entity who "willfully" fails to collect, truthfully account for or pay over withheld trust fund taxes imposed by the Internal Revenue Code. For purposes of this section, the term "willful" means a voluntary, conscious and intentional act to prefer other creditors over the United States. See, e.g., Purcell v. United States, 1F.3d 932 (9th Cir. 1993). Thus, a responsible person may have a "momentary oversight" and forget to pay the IRS while simultaneously paying other creditors. Despite the responsible person saying, "Oops, I forgot to pay the IRS taxes," that person, nevertheless, acted "willfully." The "Oops" does not change the fact that the person knew of the duty to pay the taxes and acted "willfully" in failing to adhere to that duty. Similarly, the failure of Davega to adhere to the duty of nondisclosure of which he was aware constituted willful conduct under section 7431, regardless of whether the disclosure was an "Oops" or the result of malicious intent.

The characterization of the disclosure by Davega as "insignificant" by the Ninth Circuit is particularly troubling. The legislative history and background of section 7431 belies the notion that an improper disclosure of tax return information can ever be insignificant.

Section 7431 is the successor to former I.R.C. § 7217, which imposed liability on I.R.S. employees who improperly disclosed return information. These civil penalty provisions were part of comprehensive reforms to restrict disclosure of return information enacted as § 1202 of the 1976 Tax Reform Act, P.L.

94-455, reforms spurred by the disclosures during the Watergate hearings of government misuse of tax return information.

In addressing the Senate Finance Committee in its hearings on federal tax privacy, Senator Joseph Montoya expressed the fears felt by citizens due to malicious or callous disclosures of personal information by the IRS:

> "We have heard testimony which pinpointed the growing alienation of the taxpayer. We have heard complaints that illustrate the taxpayer's increasing belief that the IRS is in a position to betray the confidence of the citizen and that it sometimes does betray that trust.
>
> * * *
>
> ". . . [t]he traumatic experience of the public in recent disclosures of the political misuse of taxpayer information has underlined the necessity for limits to be drawn and for penalties to be established so that privacy and constitutional rights of American citizens will be protected at the same time that efficiency in government is assisted."

Federal Tax Return Privacy: Hearings Before the Subcommittee on Administration of the Internal Revenue Code of the Senate Finance Committee, 94th Cong, 1st Sess. 159, 160 (1975)

(statement of Senator Joseph Montoya). The penalties referred to by Senator Montoya included a civil remedy to vindicate the rights of the taxpayer. *Id.* at 193; *see*, also, *Federal Tax Return Privacy: Hearings Before the Subcommittee on Administration of the Internal Revenue Code of the Senate Finance Committee*, 94th Cong, 2d Sess. 5 (1976) (statement of Hope Eastman, Assoc. Dir. ACLU).

One searches section 7431 in vain for a provision that says that the United States shall not be held liable for unauthorized disclosures which are "insignificant." There are two important reasons for the absence of such a provision.

First, any improper disclosure of tax return information can have serious consequences. When Congress enacted section 6103, it was concerned that the public, if it perceived that the IRS could disclose return information for non-tax purposes, would react in a way that would seriously impair the effectiveness of the voluntary assessment system, which is the mainstay of the federal tax system. See, United Liquor Co. v. Gard, 80-2 U.S.T.C. ¶ 9827 (D. Az. 1980), (quoting H. Rep. No. 94-658, 89th Cong. 2d Sess., Reprinted in U.S. Code Cong. and Ad. News 2897, 3747). Thus, the mere notion that the IRS can consciously disclose tax return information to a newspaper reporter, who in turn includes that return information in a widely-circulated newspaper article, while only suffering a fine of $1,000.00 plus court costs, may by itself seriously impair the functioning of the voluntary assessment system, regardless of the nature of the return information disclosed.

Second, determining whether tax return information is "significant" or "insignificant" is an extremely subjective task. The amount the IRS collected from petitioner and her former husband may have seemed insignificant to the Ninth Circuit panel which

decided this case, but it would not have been insignificant to existing and potential creditors of petitioner and/or her former husband. Such information may also not have been insignificant to prosecutors in the U.S. Attorney's Office seeking a forfeiture of the property of petitioner and/or her former husband under the forfeiture laws related to those laws under which petitioner's former husband was tried and convicted (the RICO provisions).

Concerns about IRS misuse of power, including its power to disclose confidential information about private citizens, are just as valid today as they were when the predecessor to section 7431 (former 26 U.S.C. § 7217) was enacted. In the Fourth and Fifth Circuits, a taxpayer victimized by an IRS agent who, like Davega, consciously discloses return information without reason for believing that action lawful are entitled to recover punitive damages. In the Ninth Circuit, a taxpayer like petitioner is limited to $1,000.00 liquidated damages, absent a showing of subjective malice. This Court needs to ensure that the conflict between the circuits is resolved and the privacy interests meant to be vindicated by § 7431 are adequately safeguarded. If the Ninth Circuit decision stands unreviewed, it will lead to inconsistent treatment of taxpayers under the disclosure laws, and can only have a negative impact on the voluntary assessment system which forms the backbone of our current income tax system.

2. What Constitutes a Disclosure Under § 7431

As the Ninth Circuit recognized, its holding that Davega's statement to Levin was one disclosure conflicted with the Fourth Circuit's holding in Mallas, supra. App., infra, at p. 10. The Ninth Circuit attempted to minimize the conflict by stating that Mallas was distinguishable on the facts. The conflict cannot be so readily avoided.

As the Fourth Circuit acknowledged in Mallas, when the IRS makes one communication of tax return information to multiple persons, there are multiple disclosures. In Mallas, the IRS improperly sent 33 letters out to married couples. The Fourth Circuit held that this constituted 66 disclosures, not 33 disclosures. In so concluding, the Fourth Circuit stated as follows:

> Section 7431(c)(1)(A) imposes damages of "$1,000.00 for each act of unauthorized disclosure of a return or return information," and section 6103(b)(8) defines a "disclosure" as "the making known to any person in any manner whatever a return or return information." We conclude from these provisions that the "act" to be counted for computing damages is the "making known to any person in any manner whatever" the return information. Each time the government "makes known" return information to a person in violation of section 6103, it has committed an "act of unauthorized disclosure." The Government's contrary construction effectively reads out of the section the phrase "in any manner whatever:" If the IRS addresses and mails a single RAR to two people, it makes the information in the RAR known to each of them no differently than if

> it had decided to use two copies of the RAR, two envelopes and two stamps.

993 F.2d at 1121.

The Fourth Circuit, in essence, held that a single "utterance" can constitute more than one "disclosure" under sections 6103 and 7431 of the Internal Revenue Code. Under this rationale, the single oral statement by an IRS official in a small room with 20 other people constitutes 20 disclosures, not one disclosure. Similarly, a single oral statement by an IRS official on a television program constitutes a "disclosure" to each person watching that program, not just one disclosure.

The Ninth Circuit explicitly rejected this rationale in the present case. The Ninth Circuit stated that "we believe that the disclosure of information to a person who is likely to publish that information is relevant in determining the degree of negligence or recklessness involved, not the number of disclosures." App., infra, at p. 10. Thus, under the Ninth Circuit's view of the law, the IRS could intentionally disseminate tax return information in violation of section 6103 to a television station, knowing that this information would be broadcast to thousands of people, and only be subject to a penalty of $1,000.00.[3]

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[3]Under the Ninth Circuit's holding, the fact that the disclosure was made to a television station could be taken into account in assessing punitive damages. In the present case, however, the Ninth Circuit failed to follow its own rule. The Ninth Circuit affirmed the District Court's denial of punitive damages notwithstanding the fact that "Davega's unauthorized disclosure of return information to a reporter

Such a holding clearly conflicts with the rationale relied upon by the Fourth Circuit in Mallas and creates a conflict in the Circuits which this Court should resolve.

The Ninth Circuit's holding also flies in the face of the broad definition of "disclosure" under section 6103(b)(8). Clearly, if the IRS had sent letters to all 181,734 recipients of the March 30, 1990 Valley Edition of the Los Angeles Times containing the return information which was disclosed by Davega to Levin, the United States would be liable to petitioner for 181,734 disclosures, or $181,734,000.00. The only difference between such a scenario and what actually happened in this case is that the IRS disseminated the illegally disclosed return information via a conduit different than the United States mail, namely, the Valley Edition of the Los Angeles Times. Davega knew he was speaking to a Times reporter, knew that he should refer such an inquiry to the Public Affairs Office, knew that the amount collected from a taxpayer constitutes return information which cannot be disclosed and nevertheless consciously disclosed to the reporter the return information of petitioner regarding the amounts collected. On these facts, what the IRS did was the functional equivalent of sending a letter to each and every subscriber to the March 30, 1990 Valley Edition of the Los Angeles Times containing petitioner's tax return information.

Amazingly, the Ninth Circuit's opinion does not cite to or discuss the definition of "disclosure" in section 6103(b)(8). Such a failure to even discuss or cite the text of the language

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is more serious in the abstract than an authorized disclosure to a private citizen." App. infra, at p. 11.

upon which petitioner relied in support of her case (and upon which the Fourth Circuit based its holding in Mallas) highlights the fact that the Ninth Circuit's holding in the present case conflicts with the Mallas opinion and illustrates the weakness of the Ninth Circuit's holding.[4]

The Ninth Circuit, in essence, told petitioner she must lose because it would cost the government too much money if petitioner were to prevail on this issue. In focusing on this point, the Ninth Circuit committed some very serious errors. First, the statute says nothing about limiting the definition of "disclosure" merely because the "plain language" of the statutory definition of "disclosure" results in a very large damage award. Section 6103 was enacted in the 1970's. At that time, Congress was most certainly aware of the existence of mass communications and the mass media referred to in the Ninth Circuit's opinion. Congress could have, had it so chosen, adopted a narrower definition of "disclosure" or imposed a "cap" on the total award resulting from a disclosure to the mass media. Indeed, if petitioner were to prevail in this matter, Congress would be free to impose such a cap in future cases. While, as a policy matter, some type of cap might be desirable, the Courts are not in the business of deciding such policy matters. Rather, such policy matters are in the Congressional domain. It was error for the Ninth Circuit to venture into such policy matters in light of the broad definition of "disclosure"

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[4]Ironically, the Ninth Circuit relied, in part, upon the "plain language" of the statute in affirming the dismissal of petitioner's claim under 26 U.S.C. § 7433. Petitioner is not seeking a review of the Ninth Circuit's ruling on the § 7433 issue.

adopted by Congress in the 1970's, when mass media was in full swing.

Second, the Ninth Circuit's view that ruling for respondent costs the government less money than ruling for petitioner is not necessarily accurate. Indeed, it appears that Congress, in enacting sections 6103 and 7431, concluded otherwise. As noted previously, the primary motivation of Congress in enacting sections 6103 and 7431 was to protect the integrity of the voluntary assessment system. Once the general taxpaying public finds out that a senior IRS official can make an unauthorized disclosure of tax return information to a newspaper reporter which then appears in the Los Angeles Times, and the result is a mere fine of $1,000.00, the result will be an erosion of the taxpaying public's confidence in the ability and/or willingness of the IRS to keep tax return information confidential. This in turn will lead to an erosion of the voluntary assessment system which could cost the government far more in lost revenues than the $181,000,000.00 sought by petitioner here. Of course, there is no way to measure the exact amount of revenues which are lost when the taxpaying public loses confidence in the ability and/or willingness of the IRS to keep their tax return information confidential. In adopting a broad definition of "disclosure," however, Congress decided that the very occasional large damage award (regardless of size) is the necessary price that must be paid for preserving the integrity of the voluntary assessment system. The Ninth Circuit erred when it decided this case in contravention of this Congressional judgment and in a manner that conflicts with the holding of the Fourth Circuit in Mallas.

This case, therefore, warrants review by this Court not only because of the conflict in the Circuits on both issues discussed above but also because the issue of improper

disclosure of tax return information goes to heart of the ability of the government to collect taxes under the voluntary compliance system. If the taxpaying public perceives that the IRS is playing fast and loose with confidential tax return information, the willingness of the taxpaying public to disclose to the IRS the intimate financial and personal information which must appear on tax returns could very well evaporate. This, in turn, could seriously impair the ability of the government to raise revenue. Thus, the significance of the issues in this case goes far beyond the $181,000,000.00 being sought by petitioner in this case. The issues in this case deal with the government's ability to maintain confidence in the integrity of the government in performing one of government's most basic functions: collecting revenues.

Certainly petitioner is seeking a great deal of money. But to characterize what happened to petitioner as a "molehill," as did the Ninth Circuit, demonstrates a complete lack of understanding of the significance of illegal disclosures of tax return information, particularly ones made to newspaper reporters.

There is no such thing as an "insignificant" illegal disclosure of tax return information to a newspaper reporter. This is perhaps best illustrated by the following hypothetical. Suppose an individual was nominated for a seat on the Supreme Court. Further suppose that a newspaper reporter called the IRS and asked an IRS official whether the nominee had ever claimed any charitable contributions. Further suppose that the IRS official, as the result of a "momentary oversight," told the reporter that in 1994, the nominee claimed a $500.00 charitable contribution to either Planned Parenthood or the Right to Life Foundation, and this information thereafter appeared in a periodical with a large circulation.

Certainly, one could not characterize the disclosure as "insignificant," notwithstanding the small amount of money involved. Yet both the IRS and the Ninth Circuit maintain that the nominee would recover a maximum of $1,000.00 in the absence of actual damages. (Actual damages would be very difficult to prove, in any event.) Such a result hardly instills confidence in the taxpaying public that the IRS can be held accountable for its transgressions. Such a result, like the result in the Ninth Circuit's opinion in the present case, tells the informed taxpaying public that, as a practical matter, the IRS is effectively unaccountable for its transgressions of the disclosure laws. The eventual result could be the destruction of the system of voluntary compliance so important to our present form of government.

CONCLUSION

For the foregoing reasons, Petitioner Erma Miller prays that this Court grant a Writ of Certiorari to review the decision of the Court of Appeals for the Ninth Circuit.

DATED: December 15, 1995

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERMA MILLER,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 94-55226
D.C. No.
CV-92-01903-HLH
OPINION

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
August 8, 1995—Pasadena, California

Filed September 18, 1995

Before: David R. Thompson, Edward R. Leavy and Stephen S. Trott, Circuit Judges.

Opinion by Judge Trott

SUMMARY

Tax/Internal Revenue Service/ Litigation and Procedure (Civil)

The court of appeals affirmed a judgment of the district court. The court held that a taxpayer's challenge to the validity of the Internal Revenue Service's (IRS's) determination of her income tax in a jeopardy assessment was not actionable under 26 U.S.C. § 7433, which provides for damage claims for unlawful collection actions by the IRS. The court also held

that the IRS was only liable for the initial unauthorized disclosure by one of its officials of the taxpayer's tax return information to a newspaper reporter, and that each copy of the newspaper in which the reporter's article appeared did not constitute a separate disclosure giving rise to separate damages under 26 U.S.C. § 7431.

In 1989, the IRS made a jeopardy assessment against appellant Erma Miller and her former husband for allegedly unpaid 1987 income taxes. Miller filed an administrative claim challenging the jeopardy assessment. The IRS denied the claim, and Miller filed an action in district court challenging the assessment. One day before trial, the IRS conceded that the jeopardy assessment should be abated.

A local newspaper published an article reporting on the abatement of the assessment. Miller's former husband, an attorney, was a central figure in an ongoing and well-publicized insurance fraud investigation. An IRS official, Richard Davega, was cited in the article as admitting that the agency had obtained little of value from Miller and her former husband, and was quoted as saying "[l]et's just say that it was insignificant." An assistant United States Attorney, George Hardy, was quoted as saying that "depriving [Miller's former husband] of money to defend himself was 'absolutely not a strategy' in the jeopardy assessment."

Miller filed a complaint in the district court against the federal government, alleging that the IRS intentionally or recklessly made an erroneous jeopardy assessment and sought damages for unlawful collection actions under § 7433. Miller also sought damages under § 7431, which provides for recovery of damages for unauthorized disclosure of tax return information, based on the statements Davega and Hardy made to the newspaper. She claimed that each copy of the newspaper sold or distributed constituted an actionable unauthorized disclosure and that she should be able to collect the statutory minimum of $1,000 for each such disclosure.

The district court dismissed the first count for lack of subject matter jurisdiction on the ground that § 7433 can only be used to attack unlawful collection practices, not the validity or merits of an assessment. The court also found that Hardy's statement was not an unauthorized disclosure, but that Davega's was. The court further found Davega's statement to be negligent as a matter of fact, but not willful or grossly negligent. The court awarded Miller the statutory minimum of $1,000 for Davega's statement, but only for one disclosure. Miller appealed.

[1] An unlawful act in connection with the "notice and demand" part of the tax collection process could trigger § 7433 liability. Miller, however, did not allege a deficiency in the "notice and demand" procedures taken by the IRS; she alleged only an unlawful act in regard to the improper determination of her tax. [2] A taxpayer cannot seek damages under § 7433 for improper assessment of taxes. Because Miller challenged only the IRS's determination of her tax, her claim was not actionable under § 7433.

[3] Disclosure of tax return information to a person who is likely to publish that information is relevant in determining the degree of negligence or recklessness involved, not the number of disclosures. [4] Section 7431 punishes "disclosure," not subsequent disseminations. The district court correctly limited the IRS's damages for unauthorized disclosure to $1,000 for Davega's single statement to the newspaper.

[5] Even though Davega's unauthorized disclosure of Miller's tax return information to a reporter was more serious in the abstract than an unauthorized disclosure to a private citizen, the district court did not clearly err in finding that Davega's disclosure was the result of simple negligence.

[6] Hardy's statement was not a disclosure of Miller's tax return information. [7] The statement did not identify Miller; it disclosed no information from tax returns; and, Hardy's

information did not come from IRS files. [8] Furthermore, Hardy's denial of improper motive was based on information that was already in the judicial record.

COUNSEL

A. Lavar Taylor, Santa Ana, California, for the plaintiff-appellant.

Gary R. Allen and Jonathan S. Cohen, United States Department of Justice, Tax Division, Washington D.C., for the defendant-appellee.

OPINION

TROTT, Circuit Judge:

OVERVIEW

Erma Miller appeals the district court's grant of summary judgment in favor of the Internal Revenue Service (IRS) on count I of her complaint, holding that she could not recover damages under § 7433 of the Internal Revenue Code for alleged misconduct by the IRS. Miller also appeals the district court's judgment after trial on count II, awarding Miller the minimum of $1,000 pursuant to § 7431 of the Internal Revenue Code for unauthorized disclosure by the IRS of tax return information. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291, and we affirm on both counts.

FACTS and PROCEDURAL HISTORY

In mid-November of 1989, the IRS made a jeopardy assessment against Miller and her former husband, Lynn Stites, for allegedly unpaid 1987 federal income taxes. Miller filed an

administrative claim challenging the jeopardy assessment. The claim was denied by the IRS. On March 16, 1990, Miller filed an action in the district court challenging the jeopardy assessment. One day before the case was to be tried, the IRS conceded that the jeopardy assessment against Miller and her husband should be abated.

On March 31, 1990, the Los Angeles Times, Valley Edition, published an article entitled "Fraud Inquiry Wins A Round In Court." The article, written by Myron Levin, reported:

> Attorney Lynn B. Stites, the focus of a criminal investigation in the "Alliance" insurance fraud case, has won a skirmish in his battle with the federal government, which bungled an attempt to seize $2.8 million it says Stites owes in unpaid taxes, according to papers filed in federal court in Los Angeles.

The article went on to report that the United States Attorney's office in Los Angeles had filed a notice that the disputed jeopardy assessment would not be defended and would be abated. The article stated that Stites was an attorney "who has been described in a nationwide media coverage as the alleged mastermind of an insurance scam involving a ring of Los Angeles area lawyers that prosecutors have called the 'Alliance.' " The article reported that:

> Lawyers in the U.S. Attorney's office in Los Angeles could not be reached; and an IRS spokeswoman declined comment on the case. An IRS official [Richard Davega] admitted that the agency has obtained little of value from the Stiteses. "Let's just say it was insignificant," he said.

Alleging that "[c]ourt papers and other records show the government botched the effort to tie up Stites's assets," the article

went on to describe the IRS's failure to locate and seize assets. The article further stated:

> George D. Hardy, the assistant U.S. Attorney in San Diego heading up the Alliance investigation, said "depriving Stites of money to defend himself was 'absolutely not a strategy' in the jeopardy assessment."

On March 27, 1992, Miller filed a complaint in district court. Count I of her amended pleading alleged that the IRS had intentionally or recklessly made an erroneous jeopardy assessment against her, and sought $575,000 in damages pursuant to I.R.C. § 7433 for unauthorized collection actions. In count II Miller sought $181,734,000 in damages for an alleged disclosure of tax return information by Davega and Hardy in violation of I.R.C. § 7431, based on the two statements contained in the Los Angeles Times.

The district court dismissed count I for lack of subject matter jurisdiction on the ground that § 7433 can only be used to attack unlawful *collection* practices, not the validity or merits of an assessment. The district court ruled on count II after a trial that the statement by Davega was an unauthorized disclosure, but that Hardy's statement was not. Davega's statement was found as a matter of fact to be negligent, but not willful or grossly negligent. Miller timely appeals the decision of the district court.

DISCUSSION

I

Miller first appeals the district court's dismissal of count I for lack of subject matter jurisdiction under § 7433. Section 7433 of the Internal Revenue code provides that:

> If, *in connection with any collection* of Federal tax with respect to a taxpayer, any officer or employee

> of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. (Emphasis added).

Jeopardy assessments are implemented where the assessment *or* collection of tax is determined to be in jeopardy. Under such circumstances, the IRS is authorized to make an immediate assessment without following the procedures required for an ordinary assessment, and then may proceed to collect the tax as assessed without delay. *See* I.R.C. §§ 6861, 6862. Section 6861 states that:

> If the Secretary believes that the assessment or collection of a deficiency . . . will be jeopardized by delay, he shall . . . immediately assess such deficiency . . . and notice and demand shall be made by the Secretary for the payment thereof.

[1] The district court concluded that the assessment or tax determination part of the process is not an act of "collection" and therefore, not actionable under § 7433. Section 6861 has a two part purpose, assessment on one hand, and notice and demand on the other. Because the statutory requirements of "notice and demand" are under § 6303, chapter 64, Collection, "notice and demand" is a collection procedure. Therefore, an unlawful act in connection with "notice and demand" could trigger § 7433 liability. However, in this case, Miller does not allege a deficiency in the "notice and demand" procedures taken by the IRS; she alleges only an unlawful act in regard to the improper determination of her tax. Because of this distinction, Miller's claim that the jeopardy assessment was invalid and without foundation as a result of improper determination is not actionable as a matter of law under § 7433.

[2] The Supreme Court has ruled that in a case involving the government's sovereign immunity the statute in question must be strictly construed in favor of the sovereign and may not be enlarged beyond the waiver its language expressly requires. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-35 (1992). In regard to § 7433, the Fifth Circuit has recently held, "based upon the plain language of the statute [§ 7433], which is clearly supported by the statute's legislative history, a taxpayer cannot seek damages under § 7433 for improper assessment of taxes." *Shaw v. United States*, 20 F.3d 182, 184 (5th Cir.), *cert denied*, 115 S. Ct. 635 (1994). We agree. Moreover, the conference committee responsible for this legislation rejected a proposed amendment to allow taxpayers the right to sue for damages in connection with the *determination* of federal tax. The committee further stated, "An action under this provision [§ 7433] may not be based on alleged reckless or intentional disregard in connection with the determination of tax." H.R. Conf. Rep. No. 1104, 100th Cong., 2d Sess. 229 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5048, 5289. Because Miller is challenging only the determination of the tax, the claim is not actionable under § 7433 of the Internal Revenue Code. We hold that the district court properly granted the summary judgment motion in favor of the IRS for lack of subject matter jurisdiction. In so doing, we align ourselves with the Fifth Circuit as well as the First Circuit's holding in *Gonsalves v. IRS*, 975 F.2d 13, 16 (1st Cir. 1992), and affirm.

II

Miller next claims that each copy of the 181,734 copies of the Los Angeles Times, Valley Edition, constituted an actionable unauthorized disclosure entitling her to redress under § 7431. Under her formula based on $1,000 per copy she would be entitled to $181,734,000 in damages.

Both parties agree that the district court correctly determined that an unauthorized disclosure was made by Davega

under I.R.C. § 6103(b), entitling Miller to damages under § 7431(a) of the Internal Revenue Code. The question, however, is for how many disclosures is Miller entitled to damages, one, or 181,734?

Section 7431 states that:

> (a) In general
>
> (1) Disclosure by employee of the United States.—If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.
>
> . . . .
>
> (c) Damages.—In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of:
>
> (1) the greater of:
>
> (A) $1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or
>
> (B) the sum of
>
> (i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus

(ii) in the case of a willful disclosure which is the result of gross negligence, punitive damages, plus

(2) the cost of the action.

To support her reading of this statute, Miller argues that disclosing information to a reporter is tantamount to disclosing it to the reporter's audience. She relies on *Mallas v. United States*, 993 F.2d 1111 (4th Cir. 1993). In *Mallas*, the Fourth Circuit determined that the mailing of thirty-three letters containing revenue information constituted sixty-six disclosures due to the marital status of the recipients. *Id.* at 1124-25. Miller argues that the same logic can be extended to the IRS's disclosure to the Los Angeles Times. Other than *Mallas*, however, Miller's argument has no case law support; and the factual setting presented in *Mallas* is distinguishable. Thus, *Mallas* is not persuasive in this setting.

[3] In addition to the lack of supporting case law, the public policy reason for not allowing this form of second party dissemination to be actionable is apparent. In the modern era of mass communication, one statement on the worldwide computer network or to a television reporter could result in disseminations that could break our nation's treasury. For example, until Miller discovered that the disclosure was made only in the Times Valley Edition, she was seeking $1.1 billion in damages representing the paper's total circulation multiplied by $1,000 dollars. In a case involving no actual damages, such a prayer gives new meaning to "overreaching." Accordingly, we believe that the disclosure of information to a person who is likely to publish that information is relevant in determining the degree of negligence or recklessness involved, not the number of disclosures.

[4] Because the statute punishes "disclosure," not subsequent disseminations, we conclude that extending *Mallas* into the current situation is not warranted. We are confident that

Congress did not intend the bizarre remedy sought in this case. The district court correctly limited the IRS's damages for unauthorized disclosure to $1,000 for Davega's single statement to the Los Angeles Times, Valley Edition.

III

Miller contends she is entitled to punitive damages because the district court erred in finding that, "Mr. Davega's release of taxpayer return information was negligent, but not willful or grossly negligent." A district court's finding of negligence is reviewed under the clearly erroneous standard. *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991); *Barnett v. Sea Land Serv., Inc.*, 875 F.2d 741, 745 (9th Cir. 1989).

[5] To establish gross negligence, Miller needed to present evidence demonstrating that Davega blatantly disregarded the rules governing disclosure. Miller's contention that Davega should have known better because he was educated on the subject of disclosure is insufficient to show that the district court's finding of simple negligence was clear error. The district court correctly viewed the disclosure as a momentary and insignificant oversight. To quote the court, "Well, I think this is an oops case. O-O-P-S, oops." The only evidence to counter this finding is the fact that Davega knew that Levin was a reporter and that Davega had been trained not to disclose taxpayer information. Even though Davega's unauthorized disclosure of taxpayer return information to a reporter is more serious in the abstract than an unauthorized disclosure to a private citizen, we conclude the district court did not clearly err in finding that Davega's disclosure was the result of simple negligence. In the main, the record suggests that Miller and her attorneys have attempted to convert a proverbial molehill into Ft. Knox.

Because the disclosure by Davega was not willful or grossly negligent, we do not reach the issue of whether § 7431

punitive damages can apply where there are no actual damages.

IV

[6] Finally, Miller argues that Hardy's statement, "depriving Stites of money to defend himself was 'absolutely not a strategy' in the jeopardy assessment," was a disclosure of return information. The district court found that as a matter of law, no disclosure had taken place. We heartily agree.

The Internal Revenue Code § 6103(b)(2), defines return information as:

> (A) a taxpayer's identity, the nature, source or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether taxpayer's return was, is being, or will be examined, or subject to other investigation, or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax penalty, interest, fine forfeiture or other imposition or offense, . . .
>
> but such term does not include data in a form which cannot be associated with, or otherwise identity, directly or indirectly, a particular taxpayer.

[7] Hardy's statement was not a disclosure of Miller's return information because: (1) the statement did not identify Miller, it only identified Stites, (2) it disclosed no tax return information, and (3) Hardy's information did not come from IRS files.

[8] Even if the article was a disclosure of Miller's tax return information, Hardy's statement was not an actionable disclosure under § 6103. "[O]nce return information is lawfully disclosed in a judicial forum, its subsequent disclosure by press release does not violate the Act." *Lampert v. United States*, 854 F.2d 335, 338 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989). Hardy's statement was a response to an allegation that the United States Attorney's office was using the IRS to deprive Stites of money to defend himself. The record in this case shows that Hardy's denial of improper motive was based on the material already in the judicial record, not the IRS files. Therefore, the district court properly held that the comment by Hardy was not an unauthorized disclosure of Miller's return information under § 6103 of the Internal Revenue Code.

CONCLUSION

For the reasons stated above, we affirm the judgment of the district court on both counts I and II.

AFFIRMED.

ORIGINAL

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SANTA ANA OFFICE
NOV 23 '93

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	Case No. CV 92-1903 RLH (Ex)
ERMA MILLER,	
Plaintiff	~~PLAINTIFF'S PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW
v.	
UNITED STATES OF AMERICA,	Date: November 30, 1993 Time: 9:00 A.M.
Defendant.	Ctrm: 7

I. Proposed Findings of Fact

1. On or about November 15, 1989 the Internal Revenue Service ("IRS") made a jeopardy assessment against plaintiff and her former husband, Lynn Stites, for 1987 federal income taxes (the "1987 Jeopardy Assessment").

2. Subsequent to the making of the 1987 Jeopardy Assessment against plaintiff, plaintiff filed an administrative appeal of the 1987 Jeopardy Assessment against her. Plaintiff's administrative appeal was ultimately denied.

—

3. Thereafter, on March 16, 1990 plaintiff filed an action pursuant to 26 U.S.C. § 7429 in the United States District Court, Case No. CV 90-1296 HLH (GHKx), challenging the propriety of the 1987 Jeopardy Assessment against her. Plaintiff filed a motion to seal the record in the case, which motion was denied. One day prior to the trial in this action, and after reading plaintiff's submissions to the Court, the United States conceded that the 1987 Jeopardy Assessment should be abated against the plaintiff (as well as against plaintiff's former husband).

4. Thereafter, plaintiff filed a petition in the United States Tax Court, Case No. 6727-90, to challenge the determinations made by the IRS in the notice of deficiency issued to plaintiff for the 1987 taxable year following the making of the 1987 Jeopardy Assessment against plaintiff. After the filing of this Tax Court petition, the IRS entered into a stipulated decision with plaintiff in which the IRS conceded that plaintiff had no unreported income on her 1987 federal income tax return and that plaintiff owed no additional tax for 1987.

5. On March 31, 1990 the Los Angeles Times, Valley edition, published an article entitled "Fraud Inquiry Target Wins A Round In Court" (the "Article"). The author of this Article is Los Angeles Times staff writer Myron Levin.

6. The circulation of the Los Angeles Times, Valley edition, on March 31, 1990 was 181,734.

7. In the Article, Mr. Levin states "An IRS official admitted that the agency has obtained little of value from the Stiteses. 'Let's just say it was insignificant,' he said."

8. The IRS official quoted in the Article is Richard Davega. Mr. Davega has held the position of Chief of Special Procedures Function in Los Angeles, California since mid-April, 1989 to present, a high-level IRS collection-related management position. Prior to this position, Mr. Davega held the following IRS positions: 1) Field Branch Chief supervising five to eight revenue officer groups from April, 1985 to April, 1989; 2) group manager of revenue officers from January, 1981 through April, 1985; and, 3) revenue officer from June, 1974 to January, 1981.

9. The Article quotes George Hardy, Assistant United States Attorney, as stating that depriving plaintiff's former husband of money to defend himself was "absolutely not a strategy" in making the 1987 Jeopardy Assessment. This was not a release of taxpayer information and is not relevant to this case.

10. The amount collected by the IRS from plaintiff and her former husband following the making of the 1987 Jeopardy Assessment against them was not disclosed in any judicial proceedings prior to March 31, 1990.

11. Following the making of the 1987 Jeopardy Assessment against plaintiff and her former husband, the total amount collected by the IRS and applied towards the 1987 Jeopardy Assessment prior to March 31, 1990 is $4,601.00. The amount collected was comprised of a refund offset in the amount of $4,141.00 and a levy in the amount of $460.00.

12. The amount collected by the IRS in connection with the 1987 Jeopardy Assessment prior to March 31, 1990 was not known to plaintiff, Lynn Stites' attorney Tom Mesereau or plaintiff's attorney A. Lavar Taylor, prior to March 31, 1990. Furthermore,

neither Mr. Masereau nor Mr. Taylor made any representations to Mr. Levin as to how much the IRS collected from plaintiff with respect to the 1987 Jeopardy Assessment.

13. All IRS employees, including revenue officers, revenue agents, special agents of the criminal investigation division and public relations employees receive substantial training in disclosure since passage of 26 U.S.C. § 6103 in the late 1970's.

14. The disclosure training given to all IRS employees include training as to when tax return information may be disclosed, pursuant to 26 U.S.C. § 6103, and IRS internal procedures on handling media inquiries. This training is received by all IRS employees within their first couple of months of employment with the IRS and reinforced and updated on an annual basis in their continuing professional education courses given by the IRS.

15. All IRS employees are given a "Disclosure of Official Information Handbook," Internal Revenue Manual section 1272, upon employment with the IRS, usually within the first couple of months of their employment.

16. Pursuant to the IRS' disclosure training and the Internal Revenue Manual, IRS employees are not to respond to inquiries from the media but to instead, refer all media inquiries to the IRS Public Affairs Office.

17. Pursuant to the Internal Revenue Manual, before an IRS employee can release tax return information that is purportedly already in the public record, such IRS employee should verify that such information is already in the public record and conforms in

all respects to what was purportedly made public. IRS employees are also instructed by the Internal Revenue Manual that they can not confirm tax return information in their possession which is purportedly made public by a taxpayer or third party unless the disclosure of such information falls under one of the exceptions to confidentiality under 26 U.S.C. § 6103.

18. Richard Davega, as a long-time employee of the IRS and Chief of Special Procedures Function, received substantial training in disclosure but nevertheless, failed to follow the IRS' internal procedures and the Internal Revenue Manual when he made the statement to Mr. Levin "Let's just say it was insignificant," in response to Mr. Levin's inquiry as to the value of the assets the IRS was able to seize from plaintiff and her former husband, Lynn Stites. In particular, Mr. Davega failed to refer Mr. Levin to the Internal Revenue Service Public Affairs Office and failed to check if any part of plaintiff's tax return information, as it related to the 1987 Jeopardy Assessment, was in the public record before disclosing plaintiff's tax return information to Mr. Levin. Mr. Davega's release of taxpayer information was negligent.

19. Mr. Davega's failure to follow internal disclosure procedures as well as the Internal Revenue Manual with respect to Mr. Levin's inquiry regarding the collection aspects of plaintiff's 1987 Jeopardy Assessment was wilful, or at the very least, grossly negligent. Was not willful or grossly negligent

20. The disclosures made by Mr. Davega and Mr. Hardy, as quoted in the Article, were disclosures of "return information," as that term is defined under 26 U.S.C. § 6103(b).

111 20.5 -- "Good faith" and "bad faith" are not involved since the disclosure was not done about as a result of an interpretation of § 6103.

21. The disclosures made by Mr. Davega ~~and Mr. Hardy~~, as quoted in the Article, were not authorized disclosures under 26 U.S.C. § 6103.

~~22. Mr. Davega and Mr. Hardy knew or should have known that their disclosures to Mr. Levin, as quoted in the Article, were not authorized disclosures under 26 U.S.C. § 6103.~~

23. Mr. Davega ~~and Mr. Hardy~~ knew Mr. Levin was a staff writer for the Los Angeles Times and knew, or should have known, that their statements to Mr. Levin might be published in the Los Angeles Times.

~~24. In disclosing plaintiff's tax return information to Mr. Levin, as quoted in the Article, Mr. Davega and Mr. Hardy intended to disclose such information to the public by publication.~~

~~25. The disclosures made by Mr. Davega and Mr. Hardy, as quoted in the Article, were willful, or in the alternative, the result of gross negligence.~~

~~26. Neither Mr. Davega nor Mr. Hardy referred to 26 U.S.C. § 6103 prior to making the disclosures to Mr. Levin, as quoted in the Article; consequently, such disclosures were not made as a result of a good faith, but erroneous, interpretation of 26 U.S.C. § 6103 but were instead, made in bad faith.~~

~~27. Mr. Davega's and Mr. Hardy's disclosures to the public, via publication in the Los Angeles Times, of plaintiff's return information was a continuation of the government's bad faith conduct towards plaintiff in the underlying 5087 Jeopardy assessment.~~

28. Plaintiff suffered no actual damage by the release of taxpayer information.

///

II. Proposed Conclusions of Law

1. The disclosures made by government employees, Mr. Davega ~~and Mr. Hardy,~~ as quoted in the Article, were disclosures of "return information," as that term is defined under 26 U.S.C. § 6103(b).

2. The disclosures made by Mr. Davega ~~and Mr. Hardy,~~ as quoted in the Article, were made in violation of the prohibition against the disclosure of return information contained in 26 U.S.C. § 6103(a).

3. The disclosures made by Mr. Davega and Mr. Hardy, as quoted in the Article, were not willful and not the result of gross negligence for purposes of 26 U.S.C. § 7431(c)(1)(B), ~~thereby entitling plaintiff to~~ punitive damages are not authorized.

~~4. The disclosures made by Mr. Davega and Mr. Hardy, as quoted in the Article, were not made as a result of a good faith, but erroneous, interpretation of 26 U.S.C. § 6103.~~

~~5. Each printed copy of the Article in the Valley edition of the Los Angeles Times constitutes a seperate disclosure for purposes of 26 U.S.C. § § 7431(a) and 7431(C)(1)(A).~~ One disclosure only was made, entitling plaintiff to ~~an award of~~ damages.

6. Plaintiff is entitled to her costs incurred in this action, pursuant to 26 U.S.C. § 7431(c)(2).

LAW OFFICES OF A. LAVAR TAYLOR

Dated: November 23, 1993

MARY TSENG KLAASEN
Attorneys for Plaintiff

Adopted as modified by the Court
12/1/93
U.S.D.J.

(2)

Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

No. 95-969

In the Supreme Court of the United States

OCTOBER TERM, 1995

ERMA MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 1

QUESTIONS PRESENTED

1. Whether the district court clearly erred in concluding that punitive damages under 26 U.S.C. 7431(c)(1)(B) are unavailable in this case because the disclosure of tax return information was neither willful nor grossly negligent.

2. Whether statutory minimum damages under 26 U.S.C. 7431(c)(1)(A), of $1,000 for each unauthorized disclosure of tax return information, are to be calculated based upon the single disclosure of such information to a newspaper reporter or based upon the 181,734 copies of that newspaper distributed to its subscribers.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 66 F.3d 220. The opinion of the district court (Pet. App. 14-20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1995. The petition for a writ of certiorari was filed on December 18, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a suit against the United States seeking damages under Section 7431 of the Internal Revenue Code, 26 U.S.C. 7431.[1] That statute authorizes an award of damages against the United States for the knowing or negligent disclosure of a taxpayer's "return or return information * * * in violation of any provision of [S]ection 6103 [of the Code.]" 26 U.S.C. 7431(a). Section 7431(b) provides that there shall be no liability in the case of a "disclosure which results from a good faith, but erroneous, interpretation of [S]ection 6103." 26 U.S.C. 7431(b). Under Section 7431(c), a successful plaintiff may recover costs, actual damages, punitive damages in the case of willful or grossly negligent disclosures, and a minimum damage award of $1,000 for each act of unauthorized disclosure. 26 U.S.C. 7431(c).

a. In November 1989, the Internal Revenue Service made a jeopardy assessment against petitioner and Lynn Stites, her former husband, concerning their joint income tax liability for 1987. Petitioner brought an action in district court challenging the jeopardy assessment. On the day before the case was to go to trial, the IRS stipulated that the jeopardy assessment should be abated (Pet. App. 4-5).

Shortly thereafter, an article appeared in the Valley Edition of the *Los Angeles Times*, captioned "Fraud Inquiry Target Wins A Round In Court" (Pet. App. 15). The article stated (*id.* at 5):

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[1] Petitioner also sought damages for unauthorized tax collection activity under 26 U.S.C. 7433. The district court dismissed that claim and the court of appeals affirmed (Pet. App. 6-8). Petitioner does not seek further review of that aspect of the decision below.

> Attorney Lynn B. Stites, the focus of a criminal investigation in the "Alliance" insurance fraud case, has won a skirmish in his battle with the federal government, which bungled an attempt to seize $2.8 million it says Stites owes in unpaid taxes, according to papers filed in federal court in Los Angeles.

The article noted that the United States had filed a notice that the challenged jeopardy assessment would be abated and that (*ibid.*)

> [l]awyers in the U.S. Attorney's office in Los Angeles could not be reached; and an IRS spokeswoman declined comment on the case. An IRS official [Richard Davega] admitted that the agency has obtained little of value from the Stiteses. "Let's just say it was insignificant," he said.

It is this last remark of Mr. Davega that forms the basis of petitioner's claim for damages under Section 7431 in this case. Petitioner's theory is that each of the 181,734 copies of the Valley Edition of the *Los Angeles Times* constitutes an actionable unauthorized disclosure of her return information. Petitioner does not contend that she sustained any actual damages in this case. Instead, she contends that she is entitled to the statutory minimum damages of $1,000 for each such "disclosure" (Pet. App. 8-9). She seeks a total award of $181,734,000, plus punitive damages.[2]

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[2] Petitioner originally sought damages of $1.1 billion in this case, representing $1,000 for each of the 1.1 million copies of the newspaper circulated by the *Los Angeles Times*. The amount of her claim was subsequently reduced after it was determined that the article concerning Mr. Stites was carried only in the Valley Edition of the paper (Pet. App. 10).

b. The district court held that Mr. Davega's response to the reporter's question constituted an unauthorized disclosure of petitioner's return information. The court concluded, however, that Mr. Davega's disclosure was not willful or the result of gross negligence and that "[p]unitive damages are [thus] not authorized" in this case under 26 U.S.C. 7431(c)(1)(B) (Pet. App. 20).

The court further held that "[o]ne disclosure only was made" by Mr. Davega (Pet. App. 20). Because no actual damages were proven (*id.* at 19), the court concluded that petitioner was entitled only to the statutory minimum award of $1,000 in this case (*id.* at 20).

2. Petitioner appealed the award of $1,000 in damages, and the court of appeals affirmed (Pet. App. 1-13).[3] The court rejected petitioner's claim that Mr. Davega's single statement to the reporter constituted over 181,000 acts of disclosure. In so ruling, the court rejected petitioner's reliance on *Mallas* v. *United States*, 993 F.2d 1111 (1993), in which the Fourth Circuit held that 33 letters disclosing return information constituted 66 acts of disclosure because each of the letters was addressed to *two* people—to husbands and wives who had filed joint income tax returns. The court of appeals concluded that *Mallas* was obviously distinguishable on its facts and that "extending *Mallas* into the current situation is not warranted" (Pet. App. 10). The court emphasized that the text of Section 7431 "punishes 'disclosure,' not subsequent disseminations" (Pet. App. 10) and that

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[3] On appeal, the United States did not challenge the conclusion that an unauthorized disclosure of tax return information had occurred.

"Congress did not intend the bizarre remedy sought in this case" (*id.* at 11).

The court of appeals also held that the district court had correctly "viewed the disclosure as a momentary and insignificant oversight" that was neither willful nor grossly negligent (Pet. App. 11). The court therefore affirmed the district court's refusal to award punitive damages in this case (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals properly concluded that only one act of unauthorized disclosure was made by Mr. Davega. The repetition by a third party of a single unauthorized disclosure by a government official does not give rise to multiple awards of statutory minimum damages under Section 7431. The statute authorizes an award against the United States only for the unauthorized disclosures of an "officer or employee of the United States" (26 U.S.C. 7431(a)). The statutory minimum damage award is based only on such an "act of unauthorized disclosure" by a government official, not on the repetition of that disclosure by third parties. 26 U.S.C. 7431(c)(1)(A).

If foreseeable repetition of the disclosure occurs by third parties, and if that repetition causes injury to a plaintiff, the plaintiff may seek recovery for that injury as part of the "actual damage[s]" awardable in a proper case. 26 U.S.C. 7431(c)(1)(B)(i). In this case, however, the courts below correctly found that petitioner "suffered no actual damages" (Pet. App. 19).

And, because only one "act of unauthorized disclosure" (26 U.S.C. 7431(c)(1)(A)) was in fact made by Mr. Davega (Pet. App. 10-11), only one award of statutory minimum damages is authorized by Section 7431.

Petitioner errs in contending (Pet. 15-18) that the decision in this case conflicts with the decision in *Mallas* v. *United States*, 993 F.2d at 1124-1125. In *Mallas*, the Fourth Circuit held that the mailing of a revenue agent's report to two spouses living at the same address constituted two disclosures of that information. *Ibid.* The court of appeals correctly concluded in this case that "the factual setting presented in *Mallas* is distinguishable" (Pet. App. 10). In *Mallas*, the revenue officer made the disclosure directly to each person who received it; in this case, the revenue officer made only a single disclosure to a person who thereafter repeated it to others. The court correctly concluded in this case that "the statute punishes 'disclosure,' not subsequent disseminations" and that extending *Mallas* "into the current situation is not warranted" (Pet. App. 10). Moreover, in *Mallas*, the Fourth Circuit quoted the observation of the district court in that case that "[d]amages are not based on the number of persons who may have read or heard the wrongful disclosure * * * [r]ather damages for unauthorized disclosure [are] determined by the number of persons or institutions sent the document." 993 F.2d at 1124.

2. There is no merit to petitioner's assertion (Pet. 7-10) that the decision in this case conflicts with decisions of the Fourth and Fifth Circuits concerning the standard for imposing punitive damages in an unauthorized disclosure case. Section 7431 permits an award of punitive damages for unauthorized

disclosures that are "willful" or "the result of gross negligence" (26 U.S.C. 7431(c)(1)(B)(ii)). The courts have consistently viewed liability for punitive damages under these statutory standards to be inherently fact-specific. See *Mallas* v. *United States*, 95-1 U.S. Tax Cas. (CCH) ¶ 50,294, at 88,072 (1995); *Marré* v. *United States*, 38 F.3d 823, 827 (5th Cir. 1994); *Rodgers* v. *Hyatt*, 697 F.2d 899, 906 (10th Cir. 1983).

In the present case, the district court found that the disclosure by Mr. Davega was inadvertent and, although negligent, was "not willful or grossly negligent" (Pet. App. 18). The court of appeals held that this factual evaluation of the nature of the disclosure by the district court was not clearly erroneous (*id.* at 11). That factual conclusion, concurred in by both courts below, does not warrant further review. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

Petitioner has pointed to nothing in the record that would contradict the factual determination made by the two courts below. Instead, as the court of appeals noted in reflecting upon the enormous amount of damages sought in this case for a single act of disclosure from which petitioner "suffered no actual damage[s]" (Pet. App. 19), "the record suggests that Miller and her attorneys have attempted to convert a proverbial molehill into Ft. Knox" (Pet. App. 11).[4]

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[4] Petitioner also errs in asserting (Pet. 10) that the question whether a "willful" disclosure has occurred under Section 7431 should be determined under the standard applied in "responsible officer" cases under Section 6672 of the Code. The Eighth and Ninth Circuits have recognized that the willfulness requirement of Section 6672 is specific to that provision and is unlike other scienter requirements in the Internal Revenue Code. See *Hartman* v. *United States*, 538 F.2d 1336, 1341 (8th

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Cir. 1976); *Maggy* v. *United States*, 560 F.2d 1372, 1375 (9th Cir. 1977), cert. denied, 439 U.S. 821 (1978); *Bloom* v. *United States*, 272 F.2d 215, 223 (9th Cir. 1959), cert. denied, 363 U.S. 803 (1960). See also *Slodov* v. *United States*, 436 U.S. 238, 261 (1978) (Rehnquist, J., concurring) ("It should be apparent from the Court's opinion * * * that this notion of 'fault' may have little to do with other sections of the Tax Code.").